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SEPULTURA.

BY

Sir HENRY SPELMAN, Kt.



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SEPTEMBRA



BY
Sir Henry Slesman K.C.



INTRODUCTION

BY HENRY SLESMAN, K.C., BARRISTER-AT-LAW, OF THE INN OF COURT, LONDON, AND MEMBER OF THE HOUSE OF COMMONS, 1885-1892.



DE
S E P U L T U R A.



Since it is a work of the Law of Nature and divine Law, to bury the Dead; so it is to administer that which necessarily conduceth to it, the * *Place and Office of Burial*. If man were so impious as not to afford it, the earth to his shame will do it: she will open the pores of her body, and take in the blood; she will send forth her children, the worms, to bring in the flesh of their brother; and with her mantle, the grass, as with a winding-sheet, she will enfold the bones and bury all together in her own bosom. Men (in passion) refuse oftentimes to do it to their enemies, to wicked persons, and to notorious offenders; but she, as a natural mother that can forget none of her children, doth thus for them all both good and bad; teaching us thereby what we should do for our brethren, and branding those with impurity that answer with Cain, *Am I my brother's keeper?*

A 3.

* Gen. 4. 11. Lucan speaking to Cesar, touching them he left slain in Pharsal. lib. 7. pa. 161. *Nil agit bac ira, tabes; ne cadavera solvas. An rugus, haud refert; placido natura receperat Cuncta fini finemq; sui sibi corpora debent. So likewise that of Mecenas— Sepult natura reliquos.*

The

THE drift of my speech tendeth to the reproof of a custom grown up among us Christians, not heard of, I suppose among the Barbarians, *Selling of graves and the duty of burial*; wherein I desire a little liberty to express myself somewhat at large, as being one of the motives that lead me the rather to this Discourse.

THERE seemeth if not a warrant, yet a presedent for it in the book of *Geneser*, Chap. 23. where *Ephron* selleth a burying place to *Abraham*, but St. *Jerome* censureth *Ephron* very hardly touching the matter, even as though he had committed some point of *Symonie*, or of great impiety; and saith, for this thing of money for the burying place, *O*, the letter of perfection was struck out of his name, and that instead of *Ephron*, which signifieth *perfect*, he was afterwards called *Ephraim*, that is *unperfect*. The Scripture I confess maketh no such mention, nor *Josephus*, nor any other ancient that I can find. I hold *Calvin* much inferior to *Austen*, yet *Austen* professed himself inferior to *Jerome*: what warrant *Jerome* had for it I know not, all men take him for no imposture; I suppose (and so might *Calvin*) that he had it from the *Rabbins*, because he entitleth that book of his *Quastiones et traditiones hebraicae in Gensis*: But all are not of *Calvin*'s mind, many of the Fathers and Councils do well accept of.

For my own part, I incline with *Calvin* to the excusing of *Ephron*; for both he and the *Hermites*, as though it were against Nature to take any thing for burying the dead in their soile, gave *Abraham* free libertie, not only to bury, but to do it where he would, even in the chiefest of their Sepulchers. This contented not *Abraham*, he would not only have *usufructum rei*, the fruition of burial, but *dominium loci*, the inheritance of the soil itself. To sell this I should think is lawful, though not the other in any case: Lawful to sell the Patronage of the Church, not the Presentation, Institution, or Induction. *Precium loci in quo humandus*



humandus est, a man may take by the civil law, but there was a necessitie that *Abraham* must have the very soil proper and sollely to himself: for the circumcised might neither dead nor alive mingle with the uncircumcised, as at this day the Christians not with Infidels, the Faithful not with Hereticks or Excommunicate persons. In this also *Ephron* was content to satisfie *Abraham*, and whereas he requested no more then the cave of *Meschepelah*, *Ephron* not only granted him the cave, but the whole field also wherein the cave was, and that as a free gift, if *Abraham* would so accept it; but *Abraham* refusing to have it by gift, bought the whole field and by right of appendencie had the cave with it. Nothing in all this do I see but noblenes and bounty in *Ephron*, nor any just impediment why he might not at first have demanded the price of the field, much lesse why he might not take it, being pressed upon him, as well as *Araunah* took more money of *David* for the threshingfloore, where he was to build an Altar and to sacrifice unto God. All this notwithstanding, because the scope of the money taken by *Ephron* was for burial of the body that then wanted it, and not for the soile of the field, but for the Sepulchre, as Saint *Stephen* testifieth; *Jerome* utterly condemneth it, and the rather (perhaps) for that *Adam* and *Eve* were said to be buried there, for of such monuments he was some what curious.

Alt. 7. 16.

Yet did he not so much reprove this taking by *Ephron*, as the vice and sin of our time in requiring and exacting money for burial, which beginning then to creep into the world, gave the Church a just occasion both to censure and condemn it by many Constitutions, Canons and Decrees; whereof I will recite some, which I conceive are at this day in force (as touching the substance of them) in our Church, though neglected and not observed by our Churchmen.

CANON I.

*Lib. 7. Epist
53. et simile
ibid.*

*Epist. 4. ad
Messalium
Episc.*

Nereida a noble Woman complaining to *Gregory the Great*, that *Januarius* the Bishop of *Sardina* blushed not to require a hundred shillings for the burial of her Daughter; *Gregory* by a decretal Epistle to him, saith, We have utterly forbidden this vice in our Church, and do not suffer so bad a custom should in any case be usurped. If *Ephron* a Pagan were so considerate as to refuse it, how much more ought we to doe it that are called *Priests*? We therefore admonish, that from henceforth none attempt this vice of covetousness in any Churches. But if at any time you permit any to be buried in your Church, and that his next kinsman or heirs will of their own accord offer any thing for lights, we forbid not that to be taken; but to exact or ask any thing, we utterly forbid, lest that (which were most irreligious) the Church peradventure might be said to be sold (which God forbid,) and you also to seem glad of mens deathes, if you reape any commodity out of their carcases.

CANON II.

But a blow or two could not kill this serpent, for iniquity hath many heads. Some, as it seemeth, in the Council of *Tribury*, Anno 899, made a question, *utrum terra cemiteriata vendi posset pro Sepultura?* whether money might be taken for graves in the Church-yard? The Council answer'd No. In *Ecclesiastico* namque &c. for it is written in *Ecclesiasticus*, Deny not courtesie unto the dead, for we all shall die. And again, All things that are of earth, do return to earth. Earth, why sellest thou earth? Remember that thou art earth, and shalt go to earth, that thou must dye, and that death is coming towards thee and lingereth not. Remember that the earth is not mans; but, as the *Psalmist* saith, The earth is the Lords, and they that dwell therein. If thou sellest this earth, thou art guilty of invading the goods of another, Thou hast received it freely from God, gave it freely for his sake. We therefore absolutely forbid all Christian People to sell earth for the dead, and to deny burial due unto

De Sepultura.

to them, unless the kindred or friends of the dead person, in the name of the Lord, and for redemption of his soul, will of their own accord give any thing.

The Council of *Nans* recited by *Burchard*, and the CANON III: Council of *Varons al Wasens* delivered by *Gratian*, do both in the felse same words thus condemnne it: *Presciendum &c.* It is to be commanded (say they) according to the authority of the *Canons*, that for graves and the burial of men no reward be exacted, unless he that is dead did whilst he lived appoint somewhat of his goods to be given to the Church, in the yard whereof he is buried: or that those to whom the bestowing of his Almes, after his death, is committed, will out of their own accord give somewhat of his goods; but nothing may in any case be exacted by the *Priests* there, or by them that have the government of the place. It is also to be commanded according to the *Constitutions* of our *Elders*, that none upon any case be buried in the Church, but in the yard, porch, or vaults of the Church, &c.

The Council of *Toures* under *Alexander III. cap. Non* CANON IVV
satis, saith, For Sepulture and for receiving Uncture and
Oyl, let no man attempt to exact any kind of reward, nor to
defend his offence therein by colour of any manner of cus-
tome, for the length of time doth not diminish sins but en-
creaseth them.

It is true that all these were no more then Provincial
Synods and *Constitutions*, yet their judgments did determine
this point to be a grievous sin, and seemed to be so ortho-
doxal, that they since are taken into the body of the common-
Law, and now as powerful, general, and obligatory, as the
other parts thereof. But we will rise higher and see what
general Councils have conceived and decreed herein.

The twelfth general Council, wherein both the Churches, CANON V.
Greek

Greek and Latin, were assembled by the same Alexander at Latran in the year 1180. cap. *Cum in Ecclesia corpore*, saith, The buying and selling that is reported to be in some Churches is too horrible; as that somewhat is required for installing Bishops, Abbots, and all kind of Ecclesiastical persons in their seats; for inducting Priests into their Churches, and for Sepulture and funeral rites, for benediction of the married couple, and for other sacraments: Verily many think it lawful, because they suppose the law of custom hath got authority by long continuance; not considering that offences are so much the more grievous, by how much the longer they have ensnared the wicked Soul of man. Therefore, lest these things should be done hereafter, Wee straightly forbid any thing to be exacted either for conducting of Ecclesiastical persons to their seats, or for instructions of Priests, or burial of the dead, or benediction of them that marry, or for other Sacraments, either conferring, or collated. But if any man shall presume to do the contrary, let him know that he hath his Portion with *Geberi*; that is, that he standeth accursed, and, as the Glosse interpreteth it, That he is a Symonist.

CANON VI

Circa Ann.

1198.

The next general Council, a very great one in the same place, under *Innocens* the third, containeth the same prohibition: But because the former bridled the Clergy in taking that was not their due, this curbeth also the perverseness of the Laity, in with-holding their just duties: The words be these, *Ad Apostolicam, &c.* It is common to the Apostolick care by frequent relation, that some Clerks, for the burial of the dead, and blessing the married couple, do exact and extort money: and if it chance that their covetous desire be not satisfied, they fraudelently alledge some feigned impediment. On the other side, some Lay-men, leavened with heretical pravity, under the pretence of canonical piety, do endeavour to break a laudable custom brought in to

to the Church by the godly devotion of the faithful. Hereupon we forbid all exactions to be made, and command all godly customs to be observed; that Ecclesiastical Sacraments be freely conferred: But that they which maliciously endeavour to change a laudable custom, may upon knowledge of the matter be suppressed by the Bishop of the place. Note, that the customs protected by this Canon must be godly and laudable.

for exacting of money before the grave was opened, but the Canon forbideth it both before and after. *Nora*, (saith the Glosse) *quod pro terra in qua sepeliendi sunt defuncti, nihil est exigendum Decretal.* Gr. 1. 30. Td. 30. de parochiis, c. 13. *ad hanc placitum sacerdos os invenit alio*
 I might, as the phrase is, *girando Canonum, volumina*, produce many other Authorities whereby this sin is vehemently impugned and cryed down: But I will not plough with an Ox and an Ass together; I will not join those constitutions, which, for the most part are *National* and *Provincial*, with these I have recited, being general, either by their birth, as springing from general Councils, or by adoption, as taken out of the provincial Councils and Decrees into the body of the Canon Law, and made thereby as general and obligatory as the rest: For all these together, with all other parts of the Canon Law, as they have been heretofore in use, and that are not repugnant to the Laws and Religion of the Kingdom, or repealed by the Statutes of Hen. VIII. or of later time against Papal Usurpation, are still in force, as I conceive, and as was lately seen in two great cases, wherein every corner of the Canon Law, as well remote as obvious, ancient as the latter, we searched out either *pro* or *contra*. As for the 32. Commissioners that by the Stat. 25. H. VIII. cap. 19. &c. 3. Ed. 6. c. 11. should have pruned the Canon Law, and cut off the unnecessary branches, nothing was done thereupon, so that it still remaineth as it was before. But admit that neither these, nor other positive Constitutions extended to our Ministers, will they not be a Law unto themselves, and abstain from that which is declared to be wicked and unjust by so many godly men, so many Fathers, Councils, and Decrees of the Church.

A book was prepared, not finished or established. Let us then consider the Councils and Cannons that we have recited; and see first, what opinion they have of money taken for burials: And secondly, how they censure and decree touching it. *First,*

First, for their opinion, they declare it to be a vice, a vice CANON I. of covetousnes a bad custom, that may be laid most irreli- Greg. ad Fa- gious, as a selling of the Church, a caufe of joy to the Par- nuar. Regist. son when men die, and a reaping of commodity out of lib. 7. Ep. 55 carcases of the dead, and sorrow of the living.

II. A discourtesie to the dead by him that must dye, CAN. II. a selling of earth by him that is earth, a selling of that is Conc. Tribur. none of his own, a telling of what was given freely to give freely, a denying of burial.

III. A thing too horrible, that bringeth the portion of CAN. V. Gabezi upon the offender, that is the brand of Simony, as Concil. gene- the Glosse expoundeth it, a curse, an uncleanness, and cause rat. Lateran. - of separation from common society.

Lastly, as maladies are the most grievous and contagious that continue longest; so they conclude this to be so much the more grievous, by how much the longer it hath continued; and declare it to be *abolenda consuetudinis perversitas*, the perversity of a custom is to be abolished.

CAN. VII.
Concil. Turon.
CAN. V.
Concil. gener.
Lateran.

I am loath to use these heavy terms of aggravation; yet they proceed not from me, but from the Clergy themselves against the Clergy themselves, from the body against a member, from the Fathers, the Doctors, the Decrees of the Church, and great general Councils, against some private, particular and incorrigible offenders.

Decr. 1. 3. 16.
280. 13. 22

The sum of their censure and decrees is this,

I. That nothing be exacted or required for any sepulture, which word the Glosse declareth to comprehend the ground or place of burial, and the ministry of the Priest or Parson above the same. And in some of the Canons it is particularly expressed,

Cap. Abolenda ver. Sepulchra, col. 1207.

II. That

II. That all customes for such taking, are evil impious, and void.

III. That the offence in taking is Simony.

IV. That the cognisance thereof belongeth to the Bishop of the place.

V. That gifts of pietie for use of the Church, may notwithstanding be taken.

VI. That none should be buried in the body of the Church.

There is a fiction that *Achelous* fighting with *Hercules*, and not able to resist his force, shifted himself into divers forms, thereby to elude it. So the Canons try many evasions to help their Masters the Clergy in this point of taking, by distinguishing the places of burial, the persons that take, the time of taking, and the manner of demanding.

Of the place.

Locus purus.

De cr. Greg.
cap. Abolend
v. Sepultur.
And Grat.
Can. 12. q. 2.

* *Locus re-*
ligiosus.

For the place, they say there be three sorts, *Locus purus*, *Locus religiosus*, and *Locus sacer*: According to the civil Law, *Locus purus* is that which is most secular ground, never used for burial, nor having any kind of consecration. To this they say the Canons do not extend, for that it is some private mans; and the owner, if he will, may take money for a grave there; for *Nemo tenetur de suo beneficium facere*. No man is tyed to give his ground to a charitable use. * *Locus religiosus* is that which is assigned to some office of Religion, and nominately where the body of a dead person hath been buried. For by the very burial of that body, the nature of the soil is changed from secular, and, in reverence of this new function, counted to be religious; and now therefore by the Canons nothing may be taken for any more graves there. Some such places (I suppose) are about this City adjoyning to Church-yards, for enlarging thereof, and some of them for which the owners do take a yearly rent of the Parish that useth it, letting it unto them to sow dead mens carcasses in; as it were to sow corn, and as though the carcasses should grow up like the fable

fable of *Cadmus*) and bring them a crop to pay the rent with. This the **Canons** do merely forbid, as doth also the civil Law, and Law of humanity, the Fathers, the Councils, and the opinion of *S. Jerome* in the case of *Epbron*.

For mine owne part, I take it to be a kind of usury to let that for money, whereof the hirer can make no kind of profit. It may be said, that they might have chosen, when they first hired it, whether they would use it so or no ; and it is true : But after the thing is done, and the place thereby become religious ground by being made a burying Place ; now to let it in that kind, is (I say) against the Canons.

Latus sacrae is that which by the donation of the owner is settled upon God and the Church for some divine and Ecclesiastical service, and then consecrated thereto by the Bishop, is thereby severed from human property, as be our Churches and Church-yards; the mere property whereof, which we call Fee-simple, is said to be in *nubibus*, and *ab aliante*, though the Parson, Patron, and Ordinary, for necessities sake might make a conveyance of them. But to dispose them, or any part of them contrary to the will of the Donor, the nature of the gift, and the glory of him that is the Supreme Owner, (God Almighty,) is by these Canons Simony, *Sacrilegio*, and *extream impiety*. Hereof there must therefore be no buying or selling; and in this, no doubt, the Canonists are right; Thus much for the place of Sepulture.

Touching the *Parties* that take money for the office or ministry of burial, they say that the Canons extend not universally to all Clergy-men, but to such only as are beneficed, or have pensions for doing the Church Duties, or serving the cure; not to those which are *sine titulo, sine salario*, without benefice or stipend, and that they may therefore take what they can get; for, * *It is not inconvenient* (saith

**¶. Nec est inconveniens quod Clericus vocet operas suas, cum non
habeat unde vivat. Decr. Gr. l. 5. 29. ver. pro exequiis.**

Locus sacra

Of the Par-
ties.

the Glosse) that a Clerk should sell his paines, if he have not whereon else to live. The rest of the Clergy they leave under the Canons, yet with such shelter, and so many starting holes, as the Canons may play upon them, but not hurt them. For as time changeth, so they change the case, observing a difference in taking money before burial, and in taking after; to take beforehand, they say, is utterly unlawful, for that it implieth a buying and selling by example of Tradesmen, who first take their money, and then deliver their ware; but, *expleto officio*, when the duty is once performed, they may take what is voluntarily given them, without danger of the Canons, which we shall further examine in the next Paragraph. Yet marke in the mean time the tenor of the first Canon, *Quæsta est*: *Nereida* complained that the Bishop *velut exigere*, would exact 100 s. of her for the burial of her daughter; which complaint must needs be after the burial, it being in *Sardinia*, and *Saint Gregory* writing from Rome, or those parts; yet *expleto officio*, the burial being past, *Gregory* would suffer nothing to be taken, no not upon voluntary gift to the use of the Bishop; but for the publick use of the Church, as for lights, &c. he allowed that to be taken that was voluntarily offered, and no otherwise. So likewise doth the Canon, *precipiendum*, or third Canon, The second Canon also giveth liberty to offer somewhat for the soul of him that is dead, but nothing to be given for the grave, or burial service.

Of the manner.

The manner of taking is of three sorts, by exaction, demanding, and voluntary gift. *Exaction* is ordinarily conceived to be a wringing of that is not due from the party, or of more then is due, like the Monks of *Mount Pessulan*; to refuse burying of the body till they had their pretended duty: Or like them in the Canon *ad Apostolicam*, that alledged impeditments and excuses to raise the market by delaying the burial: or when the burial is past, like *Januarinus* the Bishop of *Sardinia*, to urge and insist upon the demand.

These

These no doubt are sharp exactions; but the word includeth smoother courses: *Lindewode* expoundeth it to require *Tit. Simoni-*
or take *a nolente*, of him that would not part with it. *Ca-*
lepine saith, that *Lactantius* useth it for *convenienter postulare*: *aca. firmit.*
John Bellonus, that *exigere est petere, exactio est petitio*, and
that the *exactores tributorum* were to called *a petendis tri-*
bus, which the *Lexicon* of the Civil and Canon Law doth
also deliver: So that to exact, is not only to wring it from
the party, but to demand or require; and to demand or re-
quire, is to exact. In this manner the fifth Canon either
useth them Synonymally, or complaineth of one abuse in the
preamble, or provideth against another in the decree. To
put it out of doubt, the first Canon useth both the words,
Peti vero aliquid, aut exigi omnino prohibemas: We utterly
forbid any thing to be either asked or exacted: and it set-
eth *exigi* in the latter place, as though *exigere* were leſſe
then *petere*; or as, *Lactant.* taketh it, *convenienter postulare*.
Note also, that this Canon was made against asking or exact-
ing after the burial, as before we have touched.

All this notwithstanding, I must truly confess (for I
deal with *Argus* and *Briarius*, them that have all perspi-
cuity and assistance) that there is no express word in any
of these Canons, against giving or taking simply, though I
think there be enough to satisfie indifferent judgments. Yet
if it be a defect in them, I have a help for it here at home
in our own Provincial Constitutions, where, in a Synod at
Westminster, assembled by *Richard* Archbishop of Canterbury,
I find it thus decreed under the *Rubrick*, *No quid*
exigatur pro Sacramentis conferendis Ca. Dicitum est, &c.
We therefore ordain, that from henceforth neither for *Ordina-*
tion, nor for Chrisme, nor for Baptism, nor for extreme un-
ction, nor for Sepulture, nor for the Communion, nor for De-
dication, any thing be exacted, but that the gifts of Christ
be given with free dispensation, and let him that doth the
contrary be accursed. So that if they must be given freely,
nothing

Statuimus.
ergo ut do-
cero.

nothing surely must be taken for them, either, *ex obliquo*, or by *avallation*.

It may be said, they require nothing by way of price for the ground or Sepulture: For the fourth Canon is, *ut nulla cuiusquam pretii exactio attendetur*; but as a reward from the party by way of gratuity. Who knoweth not that *preium* signifies a reward, as well as a *prize*? and for mine own part, I doubt not but that the Canon doth so intend it: Yet, to clear the point, the words of the third Canon are expressly, *ut nihil muneri exigatur*, that no reward be required.

I suppose by this time the offenders in this kind have left the plain field of the Canons, and taken themselves to their last hope and Castle of refuge, *Custom and prescription*, where it now resteth to beat them out. Every man knoweth that evil customs are in their own nature to be abolished; and those that be good, yet if their be a positive law against them, they are also void. The nature of this custom by the collection we have made out of the Canons, is not only declared to be excessively bad, but, by the great general Council of *Lateran*, to be very horrible, and consequently to be abolished; but being positively against the Canon it is *in ipso hoc* directly void; though there were no clause or provision in them so to denounce them, yet *ad maiorem cautelam*, the forth and fifth Canon do expressly overthrow that custom; and besides, do brand it with this Note of infamy; *The elder the worse, and the longer it hath continued, the more grievous*.

The Parsons have now a shrewd Crow to pull, for the Canonists themselves will confess all this to be true. What then remaineth with *Achelous seu versare dolis, seu certe occubere?* Corax must now help them with a quirke to cozen the Canons, and to slide from them, or they are undone. Well, hear *Io. de Athan*, one of the pole-stars of our English Canonists; Let him (saith he) that asketh any thing in this case, take heed to himself; for if he ask and take

it for his duty, or for the ground, or for sepulture, he is gone, for it is Simony: And for proof thereof, all alledge some of the Canons we have recited, with divers other, and the Opinion of *Hostiensis*; and saith further, that *A custom will then do him no good, as appeareth by the Canon of Otho*, which he is there in hand with, and that for *non satis in the Extravagant*, by us also expressed, &c. But (saith he) if he demand it when his duty is done, in this manner, for that every one that dieth, or is installed, hath used to give so much to the Priest or Church, then he shall prevale, and doth justly require it. For confirmation hereof, he produceth the resolution of *Innocent*, and other Authorities: And that *Hostiensis* saith infallibly, *That this is true, touching the duty of the Laity towards the Church*; in so much, as though this exhibition of the Laymen tends to the over-filling of the belly of the Clerks; yet it may be demanded, as he noteth in the *Extravagants*, *Tie. Simony, ca. Jacobus*: And *Athon* saith, *That he believeth it to be true, not respecting the inordinate gluttony, but the right of the Church*, alledging other Authorities to confirm it self.

To the same purpose is the opinion of *Lindewode*, the other pole starre of our English Canonists, and with the same words in part, *tit. Simonia, ca. 1. Sepulture* (saith he) *must not be sold*, and (citing 8 q. 2. §, *Isem queitur per Jo. & Co. ibi sequentibus, de sepult. ca. abolenda*) saith, that it appeareth there in the text and gloss, that in a sacred-place, as in a Church or Church-yard, nothing must be required for Sepulture, no wrye for the office of burial, as *Bernard* there noteth. And this is true as touching his office, because a Clerk by reason of his benefice is tyed unto it. But it is otherwise, if he be not tyed thereto by reason of his Benefice, and so that he doth not constraint to have it, for then it is Simony; (*Extrav. cod. 110. ca. in ianum. secundum Hostien. & ca. non satis*) yet the *Glosse* saith, in the end of the said chapter, *abolenda*, that though Clerks may not require any thing for

for such Sepulture, yet the Laity may be compelled to observe godly and laudable customs. And mark, according to the Note of Holtiensis, in the same Chapter; That he that requireth to have the custom performed to him, must take heed to himself; for if he demand it for the ground, or for his duty, he is down, and it profiteth him nothing to alledge a custome (ut dicto capite abolendæ:.) But if he saith, that for every dead body so much hath been usually given to the Priest, or to the Church, then he shall obtain it. As in *ca. Apostolicam Extrav. cod.* & *vide Gloss. hic similem 13. q. 2. §. Item queritur. Linw. fa. 291.*

Here is a left-hand way to slip by all the Canons; let us consider it. May the Parsons frame their custom as they list? Is it like a *Proteus*, or *Lesbian Ruler*? Are they not ty'd to the matter of fact, to the manner and form of payment? Are Mood and Figure only University observations? Let them be well advised in laying their customs so, lest the Jury find an *Ignoramus*. It hath fallen upon me to be an unworthy Member of that most noble and most gracious Commission of *exacted fees and innovated Offices*, and thereby to have notice by Certificate of divers Parsons, Vicars, and chief Parishioners of most of the greatest Parishes of London, yet none of them hitherto (to my remembrance) have made any such claim, nor know I how they should prove it if they did.

I will stir no coals, nor prosecute this point any further, for the duty, love, honour, and great observation I bear unto them; but I intreat, with vehemency, that both they and the rest of their coat will think seriously of it, and if not always, yet when in their Sermons they justly fall upon the oppressions, extortions, raising of rents, &c. by Landlords and lay-men. For this bird of theirs is a winged sin, hatcht of late within this City, but crept already into the neighbour Towns, and will shortly fly (if the wings

wings be not clipt in time) over all the Kingdom: Oh, let not that of *Jeremy* be once spoken of this noble City, *From the prophets of Jerusalem is wickedness gone forth into all the Land.* *Cap. 23. 15.*

As this sin, and the Canons lie sore upon the Ministers, for taking money for graves in the Chancel, and for their pains in burying the corps wheresoever: So do they upon some other, who little dreame of it, the Church-wardens of Parishes that sell graves in the Church and Churchyard like ware in their shop, and when they think fit, make laws in their Vestry for raising the price, as they do in their Halls for the price of their ware. If they look the third Canon, they shall find themselves contained their under a fair stile, *Them that have the government of the plate*, (meaning, of the Church and Church-yard, and Parish) so that though they be laymen, yet by misusing the things of the Church, they fall into the same offence and penalty respectively that Churchmen do, and have their portion assigned them with *Geberi*, as in the fifth Canon. I have heard what some of them answer; That it is no benefit to our selves, it is for the good of the Parish, for repairing the Church, the Bells the Steeple, to help out some extraordinary charge that falls upon the Parish; and if some small matter be spent upon a Parish Audit, or a Quest-house dinner, it is an *Agape*, or Feast of love, and no man will grudge or repine at that, our Predecessors did it before our time, and our Successors will do it when we are dead and gone. All is done by an assembly of the Vestry, by consent of the Masters and chief of the Parish subscribed, and testified under their hands. Well, let their Vestry on Gods name be a *Consistory* for well ordering of the things of the Church, it is fit it should be so; but let it not be a *Parliament*, that a dozen or Sixteen private persons (I will not meddle with their trade or quality) should change or abrogate any superior Constitutions, much less those of Synods and general Councils, nor to make orders

to bind, like a law, the rest of the Parish that consented not.

What they have used to do time out of mind, I call not into question; but those Vestries that within these thirty years or thereabout, have left their ancient form, supported by a lawful prescription, and contrived to themselves a new society, power, and jurisdiction over the rest of the Parish, countenanced by an instrument from the Ordinary, under the Seale of his Chancellor; and (as new things must have new names) are commonly stiled *Selected Vestries*. I see the Bishops names are used in them, whether their assents and knowledge, I am doubtful. I assure my self their Lordships would do nothing against the Law, and I understand not by what Law they may at this day erect such Societies, or endow them with such Authority as pretended. But to deal plainly, I think those Instruments conferr more money upon the Chancellors, then authority upon the Vestries, for (by those that I have seen) the Bishop or Chancellor granteth nothing to them, but relating that they have considered the form of a Vestry desired by some of the Parish, they *allow, approve, or confirm it*, and yet no otherwise then (with a *Quantum in nobis est*) as far forth as lawfully they may, and no otherwise. Nor have they this shadow of authority otherwise then upon condition, that they shall do nothing that may trench upon the jurisdiction or profit of the Ecclesiastical Court. What have they now for their money? Or more (in effect) then if a private man had granted them as much? No doubt, many of the wise Parishioners do perceive it, and some Parishes have renounced it, and are turned back to their ancient Vestry: yet neither of them keep their bounds; for the one and the other take upon them not only to make orders in the nature of by-Laws to bind their Parishioners, but to set and raise fees and duties of the Church, and Church-Officers at their pleasure, as appeareth by many Tables produced before us. But see what they

they have gotten that claim their Fees or Duties by such Vestry Orders, or unlawful Authority: For prescription will not now help them, in so much as the original of their Fees appeareth to be by the Table, and the Table cannot defend them, for that the Authors of it had no authority to make such Assessments, and so consequently they can neither justifie the claiming of their Fees or Duties, either by the one or the other; and the Vestry-men perhaps may be in danger of an unlawful Assembly to change Laws, or to have their offence strained very high, if severity should examine it.

Give me leave to present you what I find in a Vestry-Constitution lately made, and subscribed by the Parson and Church-Wardens; with twenty three more of that Assembly, confirmed by the Bishop, approved by his Chancellor, declared to be a laudable Custom of that Parish, and in testimony thereof entered (as a solemn act) in the principal Registry of the Lord Bishop of the Diocese; and finally, ratified with the Chancellor's Hand and Seal of Office: I may say, *vidi; pruduisse videre.* But here the parcels only touching the Parson and Church-Wardens for the point in hand.

24 Novem.
1627.

Dat. 25. A.
pril, 1628.

Whosoever will bury in the Chancel, shall pay $\{ 300\ 00$
to the Parson as shall be agreed. $\{ 06\ 08$
For interring the Corps, $\{ 10\ 00$
 $\{ 06\ 08$
In the Isles of the Chancel, $\{ 28\ 08$
To the Church-Wardens for the Ground, $\{ 06\ 08$
To the Parson for interring the Corps, $\{ 06\ 08$
In the Body of the Church, $\{ 20\ 00$
To the Church-Wardens for the Ground, $\{ 06\ 08$
To the Parson for interring the Corps, $\{ 06\ 08$

In the Church-Yard.

To the Parson for inter-	{	Coffined,	s.	d.	s.	d.
ring the Corps,			2	8	1	4
To him in like maner	{	Coffined,	2	8	1	4
for every Child un-			der seven Years,			

All these double of every Stranger.

I meddle not with the Constitutions of 4*l.* to the Parson for a Pew in the Chancel, nor of 15*s.* 20*s.* 3*l.* 3*l.* 10*s.* for places and Pews in other Parts. But these and many other of the like sort fall in one Certificate. In another Parish I find six Shillings eight Pence to the Parson for the duty of burial in the Church, when himself doth it not, but his Curate, who for his Pains hath by the same Certificate ten Shillings more, besides other ten Shillings for a Sermon (though there be none.)

But to go a little back to the first demand, touching burying in the Chancel, which is not definite *in quo*, but positive *ex imperio*, that whosoever will be buried there, shall pay as shall be agreed.

It is to be Noted, That here is no custom, and consequently then, whereas the Parson thinketh the advantage lieth on his side, to take what he list, he is now excluded by all the Canons from taking any thing at all: For the buckler that should defend them is the Canon *Ad Apostolam*; and the breadth extendeth of that no further than to protect them that fight under a Custom, which also must be pious and laudable, otherwise it covereth not any. And consequently, whilst they stand upon terms, and alledge the Chancel to be their Free-hold, and that they may as freely dispose it at their pleasure, as Lay-men may of their lands, they fall into the foul pit of Simony, if they were looked after,

The

The grave is the only inheritance that we are certainly born to, the inheritance which our *Granamother the Earth* hath left to descend in *Gavelkind* among all her children : Shall one enter, and hold another out, or drive him to pay a fine *pro adeunda hereditate*, as they say in the *feodal Law* ? *pro ingressu habendo*, as we in the common *Law* ? Is our tenure base like a *Copy-hold ad voluntatem Domini*, and not rather noble by *francke Almoigne*, free from all payments and services ? How do the dead rest from their labour, if they be vexed with payments ? How go they to their grave in peace ? *Laborat aeterno qui debito tenetur*, and his peace is not worth thanks, if he must pay for it : He payeth for his peace, if he payeth for the place where his peace cannot otherwise be had : He payeth for his rest, if he cannot enjoy it, without payment : He payeth for his inheritance if he cannot enter into it without a fine *pro ingressu* ; his inheritance settled upon him by the great *Charter* ; *Terram dedit filius hominum* ? A royal gift, but as it is used, *male collactatum*, ill distributed ? The poor man (alas !) hath nothing of all this for his portion but the *Grave*, and may not now have that, unless he pay for it. Well, To whom should he pay ? Reason answereth, If to any, to the owner of the *Soil*. True, But the owner of the *Soil* was the *Founder* of the *Church*, and he out of piety, zeal, and charity, gave the *Church* freely for *Prayer*, the *Church-yard* freely for *Burialy*, *absque ulla retinencione*, without any rent, any service any reservation. Nor could he (if he would) have done otherwise, for the *Canons* would not suffer him. Nor though he were the absolute owner, yet if he had reserved but a *Pepper-corn* out of a *Grave*, it had been not only void, but execrable. — A *Pepper-corn* ? What talk we of a *peper-corn* ? no ground in the *Kingdom* is now sold so dear as a *grave*. That poor little *Cabinet*, that is not commonly above five foot long and a foot and a half in breath, where there is no room to stir either hand or foot, and the

Apoc. 14.

13.

roof, as Saint Bernard saith, lyeth so low, as it toucheth the nōle, this silly Cabinet is sometimes in the Church-yard sold to the poorest man for sixteen pence, sometimes for two Shillings eight pence, sometimes three Shillings, to sometimes six Shillings; in the Church it self at ten Shillings, twenty Shillings, forty Shillings, three pound, four pound, &c. in the Chancel, at twenty Shillings, forty Shillings, three pounds, four pound, five pound, yea ten pound: and yet the purchaser hath no assurance of it, but is constrained to hold *ad voluntatem Domini*, or as a Tenant for seven or ten years, within which term he is oftentimes cast out, and another put into his room; and no Writ of *Quare ejicit infra terminum* lyeth for him. Shall I tell what I was ashamed to hear? A grave or burying place let to farm at twenty Shillings a year, the rent duly paid for divers years, and being then behind, the Parson threatened to uncase the corps by pulling down the Monument if it were not satisfied; and shame was so far from him, as he spared not to defend it even before the Commissioners: To whom it was likewise testified, that another had made forty pound of one grave in ten years, by ten pound at a time; Strange things to me, what to others I know not, but I suppose, *cincturis non exandis* Cethesis, the oldest man living hath not heard the like. Is it not time that his Ma-
jesty should do as he doth, that like Jesus he should reform the Temple, the House of God; God be blessed that putt it in his heart, and grant him well to finish the work in hand, being so noble, so pious, and so full of necessity.

I said the Church was given freely by the Founder for Prayer, and the Church-yard freely for Burial; what reason can then be alledged, why the dead should rather pay for going into the grave, then the living do for going into the Church? Or why do not the living pay as well for the one, as the dead for the other. Alas, *morsuo iconi & lepones insultans*, a little child may pull a dead lyon by the beard, but the least dog a live will strike again upon the tallest man I have here

here a fair occasion to speak of another great abuse, the extreme exacting money for Pews; but I will hold me to the matter in hand, and for a conclusion, give me leave to upbraid our Ministers with that golden Edict of Agamemnon in *Homer*, touching the slaughtered Trojans, his enemies.

Οὐ γάρ τις φειδῶ νεκύων οἰκτικέθνειώταν

Γίνετ', ἐπείκε θάνωσι, πυρος μελισσέμεν ἄνα.

*I will that nought be taken for the grave;
But that the dead shall freely burial have.*

O shame to our Religion, that Heathens and Soldiers should be more gracious to their enemies, than a Christian Minister to his friends and brethren. *But, ferra nunc etas, &c.*

I am now led, where I was loath to come, to shew the nature and penalty of this sin. But that niceness is too late, since *Jo. de Athos, Hostiensis*, divers Canons, and some other former passages have already so manifestly discovered it to be *Simony*, under which Title it therefore standeth ranked in the Books of Canon-Law, with this censure and penalty, *sicut simoniaca pestis, &c.* as that pestilent disease of *Simony* doth exceed in greatness all other diseases, so immediately as soon as the signs thereof shall appear by the relation of any person, it ought to be cast out, and banished from the House of GOD: So odious is the contagion thereof in the Cannon Law, as it receiveth all criminous and infamous persons to become accusers, even the bondman against his Lord. It induceth suspension, irregularity, excommunication, curses, deprivation, &c. many penalties not put in execution.

The cognizance and reformation thereof, as of all other enormities in Church and Church-Men, were anciently in the Clergy themselves; 'till King *Henry II.* perceiving

G

Turnus in
Vir. Æn. 10

uses the like
curtisie in
burying his
enemy Pallas.

*Quisquis ho-
nos famuli,
quicquid so-
lamen hu-
mandi, Lar-
gior.* —

*And it is
that the
Turks in this
point cry out
upon us
Christians.*

*Decr. Greg.
lib. 3. c. 6.*

that

that many horrible crimes committed by Clerks were either smothered up in secret, or smothered over upon examination with some slight punishment; (for nothing in the Canon Law is mortal) he therefore obtained in the great Council of *Clarendon*, to have them try'd for Capital matters before his secular Judges, which first cut the hamstrings of Ecclesiastical Jurisdiction, and became a perpetual precedent for the laming of it afterwards in other Members: For hereupon the succeeding Parliaments from time to time, as they found the Clergy either sleeping or exorbitant in using their Jurisdiction, pulled somewhat à *Consistorio Cleri ad Pratorium Regis*, from the Canon to the Common-Law; and by little and little have brought the great sea of their Authority to a narrow compass; which, if my Lords the Bishops look not the bettr to, will (I fear) be yet contracted and diminished. They are not ignorant what hath been attempted against them in *Queen Elizabeth's* time and since, and that there be about four hundred persons which observe their course very strictly. Their Lordships trust their Chancellor, Commissaries, Arch-Deacons, and Officials with the Canonical government of their flocks, and these in many places, desiring money rather than amendment, do so shave and pelt the people, that the cry thereof is very grievous, and will (no doubt) produce some other reformation, if it be not (as I said) helped by themselves in time.

They were wont to limit their own Fees, and the Fees of their officers in the Provincial Synods, as appeareth by diverse of them. But their Successors kept them so badly, that although the Synod of *London* in the year 1342, had given a good smart allowance for the probate and business of a testament, as twenty shillings at least, of the money of that time for every hundred pound of the Inventory: Yet the market by *Henry VIII.* his time was grown to that height, that a thousand Marks were said to be exacted for

*Steph. Mep-
bam. Archi.
Canter. Jo.
Straford in
Synod. Lon-
don.*

for the probate busines of one man's testament (Sir William Comptons by name;) which gave the Parliament in the twenty second of the same King such discontent, as they would trust the Clergy no longer to be their own Carvers, but made a special Statute in that point to bridle their ex- actions: And so likewise about *Mortuaries* and *Corps presens*.

See Hollins.
p. 911.

Now the authority they had is gone by their Submission, *Anno 25. Hen. 8.* and the Statute thereupon then made: So as at this day they have no authority, either by Diocesan, or Provincial Synods, to set any fees but in their Convocation by assent and confirmation of his Majesty under the great Seal. In which course none have been taxed since the said Statute, till 27. *Eliz.* and then none touching any other then officers of Ecclesiastical Jurisdiction, and Courts, not Parsons, Vicars, Ministers, Church-wardens &c. And no otherwise also in the Constitutions of the Synod of *London, 25. Octobr. Eliz. & Jac. 1.* where the Lord Archbishop of some questionable fees touching the said officers, but no farther; so that the rates and taxes of fees of Parsons, Vicars, Ministers, Church-wardens, and the like, which I have often seen to be countenanced and authorized by the Ordinary of the Diocese, his Chancellor, or other officers under their hand and Seal (as farre as my understanding can discover) are without sufficient warrant, and against the Law.

An. 1584.

An. 1597.
cap. 135.

What Fees the PARSON may take.

BUT when all is done, it must not be forgotten that somewhat doubtless may be due unto the Parson upon burial of the dead, for why else should divers Canons provide that the bodies of which that die, be not carried to burial out of their Parish, least the Priest should thereby loose what is due unto him.

G 2

And

And though the Canon *Ad Apostolicam* forbid exacting of money for burials, yet it preserveth godly and laudable customs in that kind, and prescribeth a course for supressing their malice that shall attempt to break them. * *Tertullian*

* *De coronna milis. cap. 3.* maketh often mention of oblations for them, not only at the 13. 8.

+ *De castit. lib. 3. Ep. 6.* of Husbands for their Wives. So doth + *Cyprian* in di-

lib. 4. Ep. 5. verse passages, calling them sometimes *Oblations*, sometimes *Sacrificia* ; and speaking of *Oblations*, saith, *That the Mi-*

§ Lib. 1. Ep. 7. *sters had an allowance out of them for their maintenance.* §

Hospinian therefore is deceived, that supposeth them to have had their growth under || *Gregory the Great*. ¶ But in this, doubtlets, he is not deceived, that Priests and Monks, leading the people on in this Superstition of Prayers and *Oblations* for the dead, raised thereby an excessive benefite to themselves. For they made thereby the place of burial, which was publick, to become their own in private ; and then, selling it for money, shew themselves more impious then the barbarous *Ephron*, that freely offered *Abraham* his burial field.

It is now therefore to be considered, which be those laudable customs that may come within the protection of this Canon : For they doubtless are inexpugnable, though not easily to be expressed, for that they may differ according as devotion hath begotten them in any place or Parish. But be they what they may (I labour not on that ;) my drift is only to shew that they must not be those which are now in use, to take money for the grave or office of burial ; for these cannot be said to be godly and laudable customs, since so many Canons have declared them to be vicious, impious, injurious, irreligious, too too horrible, and more grievous

ciscans and ~~so mon. 3. lib. 1. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 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by their longer custom and continuance, and therefore dammeth and annulleth them by express words, how ancient or how general soever they be.

If you will put me to name some such custom as may seem laudable and Cannonical, I will present you with that which *Hostiensis*, *Athon*, and *Lindewode* delivered upon their Credit to the authentical in the Parish, where it hath been so used; *viz.* *That for everyone that dieth there, so much hath usually been given unto the Priest or Church.* This they say will hold out water; but, as I said before, I fear me none of our Parsons can maintain it in this form. Another is that we call a *Mortuarie*; which was thus paid: The Lord of the Fee had the best Beast of the defunct, by way of an *Heriot*, for the support of his Body against secular enemies; and the Parson of the Parish had the second as a *Mortuarie*, for defending his Soul against his spiritual Adversaries. I know the *Provincial*, and *Lindewode* following it, do say that the *Mortuary* was given in recompence of personal Tythes forgotten or omitted; but under correction, I doubt of that; because, that in the antient *Formularie* of Wills, and by the Canon of the Synod of *Exeter*, it is expressly directed, *That in all of them, there shall be an especial Legacy of somewhat to the Parson for Tythes and Oblations forgotten or pretermitted*; and if a *Mortuary* were for the same reason, then had the Parson in many places two several recompences for one and the same thing. It were very unreasonable also that a poor man having nothing Tythable but three Horses, should give the second of them to the Parson for Tythes omitted, when he whose Tythes are worth forty or fifty pounds a year giveth no more; nor is it like an *Heriot*, which by contract between the Lord and Tenant was reserved upon the original grant: But the Statute of *21 Hen. 8. cap. 6.* hath turned these kind of *Mortuaries* into certain sums of money, according

*Lil. 1. tit.
de consuet. c.
1. Lindew.
161. in gloss.
fo. 15.*

according to the value and estate of the Parishoner deceasing, and forbiddeth any thing to be otherwise taken either for *Mortuare* or *Corps present* (which I conceive to be, when the Corps is carried either through or into another Parish) than where it died,

Other customs there may be also, which the Canon accounteth laudable; as where Money was antiently given for lights in the Church, or for praying for the Soul of the deceased. The Parson it may be doth enjoy it at this day not mentioning the original, and so it behoveth him to do, lest the King be entituled to it by the Statute of *Superstitionis usus*. And it may be that the Money now paid for graves, was antiently the same that was given for the Soul of the dead. For Mr. Fox reciting some Laws of *Canutus*, hath this for one; *Pecunia Sepultura, justum est, ut aperta terra reddatur: Si aliquod corpus à sua parochia deferatur in aliam, pecunia sepultura, &c.* In English (saith he) *It is meet and right, that in funerals money be given for opening the earth: If any body or corse be carried from his own Parish into another, the money of the burial shall pertain by the Law to his own Parish Church.*

This Law cometh home to the point in hand, and maketh very materially for the Parson, and therefore I blame them not if they lay good hold on it as a warrant of antiquity, to shew both their right and their custom. But you must know, that this Law was not written originally in Latin, but in Saxon: And that the Translator hath not delivered it faithfully.

The SAXON is thus explaid:

Canuti. LL. It is just that the Soule-shott (or Money given for praying Eccles. c. 13. for the Soule) be always paid at the opening of the Grave:

And

And if the Corps be buried elsewhere than in its own Parish,
yet let the Soule-shot be paid to the Church, to which it
belongeth.

It is taken verbatim out of the Synod of Eanham, holden by Alpheage Archbishop of Canturbery, and Wulstion Archbishop of York, about the year 1009. in the time of King Etheldred and now in a secular Parliament (as I may call it) confirmed by *Canutus*. But the old Latin manuscript copy of that Synod cleareth the question, in these words : Cap. 14. *Munera nec non defunctorum animabus congruentia puto impendantur aperto* : Let the gifts also that are given for the behoof of souls of the dead be paid (or delivered) at the opening of the grave. This Canon neither commandeth any thing to be paid for the grave, nor yet for the soul, but only limiteth the time when that which is given for the soul should be paid. He therefore that translated *Canutus*'s Laws out of Saxon, did not truly express it by *pecunia sepultura*, nor Mr. Lambard (who rather affected eloquence then propriety) by *pecunia sepulchralis* : But Mr. Fox more unfaithfully by englissing the Latin. It is meet and right that in Funerals money be given for opening the earth, as though the Law required that money should be paid for the grave, whereas that it speaketh of, was only for praying for the soul, which by the Canons might lawfully be taken, and is that, which they also intend should be paid unto the Parish Church of the deceased, when the body is elsewhere buried ; for so an ancient paraphrastical copy of *Canutus* Laws doth express it : *Si quis corpus parentis aut amici sui ex propria parochia alias portare ad sepeliendum voluerit, faciat prius certitudinem parochiae ad quam pertinet, scilicet redditus quod Angli Vocant, quod recte persolvi debet ad aper- tum sepulchrum.*

Now

Now it appeareth how this grave-silver or money for graves grew up to be taken. It was first given for praying for souls and such like, but that being abolished and given to the King, the Parsons it seemeth take it for the grave. And to say what I think, do now take that which was given for praying for the soul, under their fee for their office of burying the Corps, and this for the grave besides, for they take them both. But I say no more.

